

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2012-000478

11/13/2013

HONORABLE JAMES T. BLOMO

CLERK OF THE COURT

G. Verbil

Deputy

IN RE THE MATTER OF
AMY E REYNOLDS

DEEAN GILLESPIE STRUB

AND

DANIEL R BARKLEY

DENNIS G BASSI

RICK B KILFOY

RICK B KILFOY

RULING

In Loco Parentis

A.R.S. § 25-409:

A. Pursuant to § 25-402, subsection B, paragraph 2, a person other than a legal parent may petition the superior court for legal decision-making authority or placement of the child. The court shall summarily deny a petition unless it finds that the petitioner's initial pleading establishes that all of the following are true:

1. The person filing the petition stands in loco parentis to the child.
2. It would be significantly detrimental to the child to remain or be placed in the care of either legal parent who wishes to keep or acquire legal decision-making.
3. A court of competent jurisdiction has not entered or approved an order concerning legal decision-making or parenting time within one year before the person filed a petition pursuant to this section, unless there is reason to believe the child's present environment may seriously endanger the child's physical, mental, moral or emotional health.
4. One of the following applies:

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- (a) One of the legal parents is deceased.
- (b) The child's legal parents are not married to each other at the time the petition is filed.
- (c) A proceeding for dissolution of marriage or for legal separation of the legal parents is pending at the time the petition is filed.

B. Notwithstanding subsection A of this section, it is a rebuttable presumption that awarding legal decision-making to a legal parent serves the child's best interests because of the physical, psychological and emotional needs of the child to be reared by a legal parent. A third party may rebut this presumption only with proof showing by clear and convincing evidence that awarding legal decision-making to a legal parent is not consistent with the child's best interests.

On November 9, 2012 Petitioners Amy Reynolds (maternal aunt) and Karen Carter (maternal grandmother) sought custody of the minor child pursuant to A.R.S. § 25-415 (now A.R.S. § 25-409). The child's Mother, Dusti Barkley (Mother), passed away shortly after the child was born. Ms. Reynolds and Ms. Carter contend that Father left the child with them and only saw the child 2 or 3 times a month for short periods of time and that Father had only one overnight with the child. Ms. Reynolds maintains that she enrolled the child in daycare and was responsible for the day to day care of the child including all medical appointments. Father contends that the child was in his care and that he would take the child to visit Petitioners. Father further contends that the child spent every night at his residence.

Two separate hearings were held in this matter and the Court found, pursuant to the above statute, that Ms. Reynolds and Ms. Carter stood *in loco parentis* to the child. The Court further found that Petitioners rebutted the presumption that it was in the child's best interest that Father be awarded custody of the child. The Court found by clear and convincing evidence that awarding Father legal decision-making was not consistent with the child's best interest.

On August 6, 2013 the Court of Appeals remanded this matter with instructions that this Court enter findings pursuant to A.R.S. § 25-403. The Court of Appeals ordered that this Court make the requisite findings based on the current or supplemented record, at the discretion of this Court. A recording of the proceedings (FTR) is available to the Court. **The Court has reviewed the record in this matter and makes the following findings and orders:**

The second of the two evidentiary hearings for temporary orders was held on January 15, 2013. During that proceeding, the Court heard from the Parties (Ms. Reynolds and Father) and other witnesses (Jennifer Canders, Rachel Gentillon, Jeff L. McDaniel, George Hay, Don Hauser, Douglas Edward Carter, Valerie Golanti, Jordana Klein, Joshua Fogelson, Patricia Elms, Desiree Neill). The Court has since considered the evidence, including the credibility and

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demeanor of the witnesses, reviewed the exhibits as well as the case history, and considered the Parties' arguments.

Amy Reynolds and Karen Carter seek to establish that they stand *in loco parentis* to the child. Under A.R.S. § 25-409. A person stands *in loco parentis* if a person "has been treated as a parent by the child and . . . has formed a meaningful parental relationship with the child for a substantial period of time."

Father disputes that Ms. Reynolds and Ms. Carter stand *in loco parentis*.

THE COURT FINDS as follows:

- The biological mother of the child died shortly after giving birth to the child.
- That Father had relegated his responsibility in raising the child to Ms. Reynolds and Ms. Carter and when Father was contemplating a possible move out of state with the child that Ms. Reynolds and Ms. Carter filed for *in loco parentis* status.
- That Father was not a credible witness.
- After two separate hearings the Court found that the child lived primarily in the care and custody of Ms. Reynolds and Ms. Carter.
- That Ms. Reynolds and Ms. Carter have been treated as a parent by the child and have formed a meaningful parental relationship with the child for a substantial period of time.

Accordingly,

IT IS THEREFORE ORDERED that Ms. Reynolds and Ms. Carter stand *in loco parentis* A.R.S. § 25-409.

THE COURT FINDS as follows regarding the child's best interests pursuant to A.R.S. § 25-403(A):

The Court, based on the testimony and the credibility of the witnesses, finds that Father was not credible.

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1. The past, present and potential future relationship between the parent and the child.

The Court finds that the child lived with Ms. Reynolds and Ms. Carter for the majority of the time subsequent to Mother's death. That Father relinquished his parental responsibility to Petitioners. That Father will attempt, in the future, to alienate the child from Petitioners. The Court finds that this factor favors Petitioners.

2. The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.

The Court finds that Petitioners were the primary care providers for the child. The Court finds that this factor favors Petitioners.

3. The child's adjustment to home, school and community.

The Court finds that the child is too young for school and is well-adjusted in all other relevant respects as to Petitioners. The Court finds that this factor favors Petitioners.

4. If the child is of suitable age and maturity, the wishes of the child as to legal decision-making and parenting time.

The Court finds that the child is too young to express a meaningful opinion on this issue.

5. The mental and physical health of all individuals involved.

Father appears to be in good physical health, though given his testimony, the Court has concerns regarding his mental health. The Court finds that Ms. Reynolds and Ms. Carter are physically and mentally fit. The Court finds that this factor favors Petitioners.

6. Which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent.

The Court finds that Ms. Reynolds and Ms. Carter are more likely to permit frequent and meaningful contact with Father and that Father will attempt to alienate Ms. Reynolds and Ms. Carter. The Court finds that this factor favors Petitioners.

7. Whether one parent intentionally misled the Court to cause an unnecessary delay, to increase the cost of litigation or to persuade the Court to give legal decision-making or parenting time preference to that parent.

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The Court found that Father is not credible. The Court finds that Father intentionally has misled the Court in an attempt to persuade the Court to give legal decision making to him. The Court finds that this factor favors Petitioners.

8. *Whether there has been domestic violence or child abuse pursuant to A.R.S. § 25-403.03.*

The Court finds that this factor does not apply.

9. *The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time.*

No coercion or duress was used to obtain an agreement regarding legal decision making. The Court finds that this factor does not weigh in favor of either party.

10. *Whether a parent has complied with chapter 3, article 5 of title 25, Arizona Revised Statutes.*

The Parties have complied or will comply with the parenting education requirement, so the court finds that this factor is not applicable.

11. *Whether either parent was convicted of an act of false reporting of child abuse or neglect under A.R.S. § 13-2907.02.*

Neither party was convicted of an act of false reporting or child abuse or neglect under § 13-2907.02

The difficulty for the Court is that A.R.S. § 25-409(B) requires that a third party (Ms. Reynolds and Ms. Carter) must overcome the rebuttable presumption by clear and convincing evidence that awarding legal decision-making to a legal parent is not consistent with the child's best interests. In this instance, as identified by the Parties agreement for parenting time that was reached during the settlement conference, there is no question that Ms. Reynolds and Ms. Carter cannot carry their burden.

Based upon the above,

THE COURT FINDS that Ms. Reynolds and Ms. Carter stand *in loco parentis* to the minor child.

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THE COURT FURTHER FINDS that Ms. Reynolds and Ms. Carter have failed to carry their burden to overcome the presumption as to legal decision making as required by A.R.S. § 25-409.

IT IS ORDERED that Father shall have sole legal decision making of the minor child.

IT IS FURTHER ORDERED that Ms. Reynolds and Ms. Carter shall have parenting time with the minor child.

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81, *Arizona Rules of Family Law Procedure*.

/ S / HONORABLE JAMES T. BLOMO

JUDICIAL OFFICER OF THE SUPERIOR COURT

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.